IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO.8 OF 2001

Union of India through
the Assistant Collector
of Customs(P), Customs
House, Mormugao. ... Applicant.

versus

1. Shri Churchill Alemao,
   R/o Novangully, Varca,
   Salcete, Goa.

2. Shri Joaquim Alemao,
   R/o Novangully, Varca,
   Salcete, Goa.

3. Shri Ciabro Alemao,
   R/o Novangully, Varca,
   Salcete, Goa.

4. Shri Costao Xavier
   Marques, r/o 71-22,
   B. Wing, Rina Park,
   Plot No.47,
   Varadhan Mhatre Road,
   Juhu, Bombay 49.

5. Shri Subhash Pandey,
   C/o Classic Construction Co.,
   2/54, Vaher Supreme Shopping
   Centre, Gulmohar Cross Road,
   No.9, J.V.P.D. Scheme,
   Bombay 400 049.

6. Shri Anthony Xavier Miranda
   @ Roy Miranda,
   R/o Near Orlim P.O.
   Orlim, Salcete, Goa.

7. Shri Anthony John Rodrigues
   @ Reginald Rodrigues,
   r/o Uddear Varca, House No.259,
   Salcete, Goa. ... Respondents.

Mr. J. Vaz, Additional Central Government Standing Counsel for the Applicant.

Mr. H. H. Ponda with Mr. M. S. Sonak and Miss Pooja Bharne, Advocates for the Respondents.

CORAM: P. V. HARDAS, J.

DATED: 17TH JULY, 2003.

ORAL JUDGMENT

The Union of India/Complainant being aggrieved by the Order passed by the Chief Judicial Magistrate, Margao, dated 31st October, 2000, in Customs Case No.1/C/94/A, discharging the Respondents/Accused, from the prosecution for an offence punishable under Sections 135(1)(i) of the Customs Act, 1962, r/w Section 3 of the Import and Export Control Act, 1947, 206, 186, 201, 379 and 120(B) of the Indian Penal Code, has filed the instant Criminal Revision impugning the aforesaid Order.

2. The facts giving rise to the filing of the present revision application may briefly be stated hereunder:-

P. W. 5, Costao Fernandes, was holding the post of Customs Officer in the Rummaging Section of Mormugao, Vasco, in May, 1991. He had received information that gold was going to be brought at the Fatrade beach, Varca, by the Churchill Brothers, who are Respondents/Accused in the present revision. P.W.5,

Costao Fernandes, was advised by his superiors to keep a watch and report the development. P.W.5, Costao Fernandes, therefore, was on the look out at the Fatrade beach, Varca. One Hotel Varca Holiday Beach Resort alleged to be belonging to Churchill Alemao and his other partners was under construction. At a distance of about 30 metres from the said Hotel, P.W.5, Costao Fernandes, had hidden himself and was keeping a watch. On 15th May, 1991, P.W.5, Costao Fernandes, went to the spot from where he was keeping a watch at about 8.00 p.m. on the motor-cycle. He had seen Original Accused No.2, Joaquim Alemao, Original Accused No.3, Ciabro Alemao, the late Alvernaz Alemao and about three persons whom he did not know. P.W.5, Costao Fernandes, maintained his vigil at the spot till 7.45 a.m. in the morning of 16th May, 1991. During the period of his vigil, there was no activity of bringing gold on the said beach. P.W.5, Costao Fernandes, thereafter returned to his house and at about 11.00 a.m, his contact reported that there was likely to be a landing on that day. P.W.5, Costao Fernandes, therefore, accordingly proceeded and hid himself at the usual place. He saw the two cars namely one Contessa Car and one Maruti Car leaving the Hotel and heading towards the beach. After some time, P.W,5, Costao Fernandes, saw two canoes approaching the beach from the seas. The persons in the canoes with the assistence of other persons from the shore removed some boxes from the canoes. The boxes were then

loaded in the two cars. Four boxes in the Contessa Car and one box in the Maruti Car. The boxes were having the appearance of car batteries. P.W.5, Costao Fernandes, then saw deceased Alvernaz Alemao driving the Contessa Car. P.W.5, Costao Fernandes, then chased the Contessa Car driven by the deceased Alvernaz Alemao. Meanwhile, before chasing the said car, he had instructed P.W.3, Gurudas Naik, to carry a note addressed to his wife requesting her to inform the Customs and the Police Authorities. In a daring attempt at stopping the Contessa Car, P.W.5, Costao Fernandes, has alleged to park his motor-cycle in front of the Contessa Car. The driver of the Contessa Car having recognised P.W.5, as Customs Officer tried to speed the Car and in that manner, the motor-cycle came beneath the Contessa Car which resulted in reduction of the speed of the Contessa Car thereby allowing P.W.5, Costao Fernandes, to open the left hand side door of the Contessa Car and step inside the car. P.W.5, Costao Fernandes, requested the deceased Alvernaz Alemao, to stop the car and thereafter, it is alleged that a scuffle ensued between them in which P.W.5, Costao Fernandes and the deceased Alvernaz Alemao received injuries. The car ultimately stopped and P.W.5, Costao Fernandes, stepped out of the car and with the help of the keys opened the trunk/dikki compartment of the car and after opening one of the battery like box, is alleged to have shown one gold biscuit to the person who had

assembled there and informed them that this was smuggled property and requested their assistence. Since none of them assisted, P.W.5, Costao Fernandes thought it fit to leave the spot since he apprehended danger to his life.

3. The Complainant examined 25 witnesses in support of his plea for framing charge against the Respondent/Accused.

4. The learned Trial Court discharged the Complainant/Accused on the grounds:- (i) that the prosecution had not been able to establish that the said two Cars namely the Contessa Car and the Maruthi Car belonged to the Accused. (ii) there was no evidence to even prima facie indicate that the boxes in the said Contessa Car contained gold biscuit. (iii) P.W.5, Costao Fernandes, had not given the details of the markings which he had noticed on the alleged gold biscuit to show that gold was smuggled and brought to India by sea. (iv) there was no corroboration from the witnesses examined by the Complainant to corroborate the statement of P.W.5, Costao Fernandes, that he had shown one gold biscuit to the persons who had assembled at the spot. (v) the evidence of P.W.4, Vincent Soares, was not corroborated by any other witness. (vi) that no seizure has been effected to prima facie prove that gold was smuggled and the same was found in the possession of the Accused. (vii) there was

contradiction in the evidence of P.W.4, Vincent Soares and P.W.5, Costao Fernandes, regarding the number of boxes that were found in the trunk compartment of the Contessa Car. P.W.4, Vincent Soares, had stated that two boxes had been removed whereas according to P.W.5, Costao Fernandes, there were four boxes.

5. The learned Trial Court, therefore, after the Complainant had adduced his evidence discharged the Accused/Respondent for the reasons stated above.

6. Section 245 of the Code of Criminal Procedure contemplates that if the Magistrate finds that no case against the Accused has been made out which if unrebutted would warrant his conviction, the Magistrate shall discharge him. Therefore, the test to be applied for an offence under Section 245 of the Code of Criminal Procedure is to see whether the evidence adduced by the prosecution if unrebutted would result in the conviction of the Accused. In other words, the Courts have to see if the Complainant has established a prima facie case.

7. The Apex Court in the case of **R.S. Nayak** v. **A. R. Antulay and another** 1986 CRI.L.J. 1922 has observed as follows:-

> "It is a fact that Ss.227 and 239 provide for discharge being ordered before the recording of

> evidence and the consideration as to whether charge has to be framed or not is required to be made on the basis of the record of the case, including documents and oral hearing of the accused and the prosecution or the police report, the documents sent along with it and examination of the accused and after affording an opportunity to the two parties to be heard. The stage for discharge under S.245, on the other hand, is reached only after the evidence referred to in S.244 has been taken. Notwithstanding this difference in the position there is no scope for doubt that the stage at which the Magistrate is required to consider the question of framing of charge under S.245(1) is a preliminary one and the test of "prima facie" case has to be applied. In spite of the difference in the language of the three sections, the legal position is that if the trial Court is satisfied that a prima facie case is made out, charge has to be framed".

8. In the present case, therefore. it has to be seen whether the evidence of P.W.5, Costao Fernandes, establishes a prima facie case. Admittedly, in the present case, the property which is alleged to have been carried in the trunk compartment of the Contessa Car has not been seized. Thus, there is no prima facie evidence that what was carried in the trunk compartment of the Contessa Car was smuggled gold. P.W.5, Costao Fernandes, admits to have opened only one box and showed one biscuit to the people who had gathered at the scene of the offence and informed them that this was smuggled gold. Beyond the statement of P.W.5, Costao Fernandes, that it was a gold

biscuit, there is no other evidence to even prima facie establish that it was a gold biscuit. The evidence of P.W.5, Costao Fernandes, that the biscuit was made of gold cannot be accepted at its face value unless there is some material in the form of either a report from the goldsmith or some other evidence to indicate that the biscuits were made of gold.

9. According to Mr. J. Vaz, learned Additional Central Government Standing Counsel for the Complainant/Applicant, the entire prosecution case hinges upon the fact whether the prosecution has prima facie proved that the biscuit, which was removed by P.W.5, Costao Fernandes from the box, was made of gold. According to Mr. J. Vaz, learned Additional Central Government Standing Counsel for the Complainant/Applicant, the fact that P.W.5, Costao Fernandes, states that the biscuit was made of gold should be accepted at this stage as it prima facie establishes that the biscuit was made of gold. By an examination with a naked eye, it is extremely difficult to hazard an opinion whether the biscuit is made of gold or otherwise. Even experts like jewellers would find it very difficult to opine only on the basis of naked examination that either the ornament or the biscuit is made of gold. In the present case, at least no evidence is led that P.W.5, Costao Fernandes, was an expert to opine that the biscuit was made of gold only on

its examination. As stated by me above, no other evidence has been led by the prosecution that the biscuit which was taken out from the box by P.W.5, Costao Fernandes, was made of gold. Obviously, the Complainant had not adduced any evidence because admittedly, according to P.W.5, Costao Fernandes, he had kept the gold back in the box and thereafter, he fled from the scene of the offence as he apprehended danger to his life. According to the prosecution, the boxes were subsequently removed by the Accused as is evident from the perusal of the evidence of P.W.4, Vincent Soares. The fact remains that there is no evidence to establish that the biscuit which P.W.5, Costao Fernandes, had taken out from the box was of gold. The evidence in respect of the other offence namely under Sections 201 and 379 of the Indian Penal Code would depend upon the prosecution establishing that the biscuit was made of gold and was smuggled gold. In the present case, there is also no evidence even by way of circumstantial evidence to prima facie indicate regarding the commission of the offence under Section 120(B) of the Indian Penal Code. There is no evidence to indicate that the Accused had entered into an agreement of smuggling gold and either that the gold was smuggled in pursuance to the said agreement. Though, the commission of the offence in respect of an offence to do an illegal act is not necessary still there is no evidence either (1) of the Accused having entered into an agreement to smuggle gold,

(2) that the gold was smuggled in pursuance to the agreement. There is no evidence at all of any agreement having entered into by the Accused.

10. After giving my anxious consideration to the material on record, according to me, the learned Trial Court was justified in discharging the Accused. Though, the Trial Court has given various reasons, some of the reasons are unsustainable in law. At this stage of consideration of the evidence of the Accused, the Trial Court ought not to have examined the evidence of P.W.5, Costao Fernandes, to see if it was corroborated by the evidence of other witnesses. The Court also could not have scanned the evidence of P.W.5, Costao Fernandes, to find out if it is corroborated by the evidence of other witnesses and examine the evidence of other witnesses as if through microscope to find out whether the evidence of the witnesses had any loopholes. The Court ought to have examined the evidence of P.W.5, Costao Fernandes, from the point of view of finding out if the evidence if unrebutted would end in conviction. Having, therefore, examined the prosecution evidence particularly of P.W.5, Costao Fernandes, according to me, the evidence does not prima facie establish that the Accused were in possession of smuggled gold which was allegedly found by P.W.5, Costao Fernandes, in the trunk compartment of the Contessa Car. According to me, therefore, the revision must fail.

11. Accordingly, Criminal Revision Application No.8 of 2001 is dismissed.

P. V. HARDAS, J.

RD.